Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ABEL BERNARD MEDINA; BENJAMIN TIBURICO TORRES AND JESUS MANUEL CHAVEZ,

Petitioners,

vs.

EDWARD MILLER, INDIVIDUALLY AND AS AN AGENT FOR THE STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, BUREAU OF NARCOTICS; EARL BRAY, INDIVIDUALLY AND AS A DETECTIVE FOR THE KERN COUNTY SHERIFF'S DEPARTMENT; JOHN LACERTOSO, INDIVIDUALLY AND AS A SERGEANT FOR THE KERN COUNTY SHERIFF'S DEPARTMENT; J.C. PLANK, INDIVIDUALLY AND AS A DEPUTY FOR THE KERN COUNTY SHERIFF'S DEPARTMENT.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the doctrine of collateral estoppel apply where a criminal defendant, whose Fourth Amendment rights have been found to violated by peace officers in a prior state proceeding, files an action pursuant to 42 U.S.C. § 1983? or

Is a peace officer, who is a defendant in a 42 U.S.C. § 1983 action, precluded from litigating the issue of probable cause where a state court has found that there was no probable cause to arrest and the peace officer violated the Fourth Amendment rights of the plaintiff?

II. Pursuant to Federal Rules of Evidence, Rule 201, is a federal court required to take judicial notice of an opinion [judgment] of the Court of Appeals for the State of California?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix A — Memorandum Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed May 15, 1997 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Ninth Circuit Filed June 30, 1997 ..... 5a

Appendix C — Order Of The United States District Court, Central District Of California Dated May 5, 1995 With Attachments 7a

Petitioners Abel Medina, Benjamin Tiburico Torres and Jesus Menual Chavez, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith at 1a. The order of the district court in this case is reproduced at 7a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 are as set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

> judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The pertinent provisions of the Federal Rules of Evidence, Rule 201 are as set forth below:

> Rule 201. Judicial Notice of Adjudicative Facts
>
> (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When discretionary. A court may take judicial notice,whether requested or not.
>
> (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking

judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF THE CASE

Prior to January 1991, Respondent Edward Miller, an employee of the Department of Justice for the State of California, had been working on a case in which Petitioner Abel Medina was a suspect. Miller knew there was an outstanding warrant for Medina but did nothing to effect the arrest. In January 1991 at the request of Miller, Kern County Sheriff's Investigator Earl Bray began an investigation of Medina's activities at Medina's father's ranch located near Stallion Springs, Kern County. Although observations did not reveal any criminal activity, Bray contacted other law enforcement agencies to secure information about Medina. Miller told Bray that there was an outstanding arrest warrant for Medina that was issued April 25, 1990, from Los Angeles County. The Stallion Springs Police Department provided Bray with gossip and speculation covering an incident eight years prior concerning possible criminal activities occurring at the ranch. Despite this unreliable and limited information, Miller, Bray, Lacertoso along with other members

of the Kern County Sheriff's Department began a stake-out on the ranch on April 2, 1991. Bray began and supervised the three-day surveillance of the ranch.

The stake-out and surveillance revealed two vans and three or four Hispanic males staying at the ranch. The officers did not observe any illegal or suspicious activities. On April 3, at approximately 3:00 p.m., Deputy McKinley Mosley of the Kern County Sheriff's Department observed a white van leave the ranch. Certain members of the stake-out team, including Miller, followed the van to the town of Tehachipi. There they observed the four men in the van go into a hardware store. Miller followed the four men into the store, but made no contact with them.

While the white van was in town and there was nobody at the ranch, Plank, under the direction of Bray and Lacertoso, entered the ranch without a search warrant, probable cause or exigent circumstances. Plank entered the fenced private property (the ranch) under the pretext of checking up on the cattle theft report.[1] When later confronted in a suppression hearing, Bray admitted that his request for Plank to search the ranch had nothing to do with the cattle theft report but to look about for any signs of criminal activity.

Plank went on to the property by parking his vehicle next to the ranch's locked gate and jumping over the fence. Mosley observed Plank's movements and recorded them in his surveillance log, which he later turned over to Bray. While on the ranch, Plank did not find anyone present. He allegedly smelled PCP. Plank reported his findings to Bray a few hours after his visit to the ranch.

The van returned to the ranch and the stake-out and

1. On March 11, 1990, Plank had taken a cattle theft report from Abel Medina's father, Jose Medina.

surveillance continued until approximately 5:00 a.m. on April 4, when two vans were spotted leaving the ranch. Bray then ordered both vans stopped because he had a hunch that Abel Medina was on board one of those vans because Bray was told that no one was left at the ranch. The two vans in which Petitioners were riding was stopped and Petitioners were arrested for the manufacture of PCP.

On June 25, 1991, an amended information was filed in Kern County Superior Court charging Petitioners with eleven criminal counts. Prior to trial at a preliminary hearing, Petitioners moved to suppress the evidence discovered during the detention of the vans and the fruits of the search warrants served on the ranch house and two Los Angeles County residences; this motion was denied. During the suppression hearing, Bray testified that he was suspicious of narcotics activity at the ranch because there was no activity in the daytime; however, the lights were on all night. Bray also testified that he ordered the vans stopped on the belief that Medina was on board and he intended to arrest Medina for the outstanding warrant and on the belief that the nighttime activities were the manufacture of PCP based the eight year old information. Bray testified that the reason he believed that Medina was on board one of the vans was because no one was left at the ranch.

At the preliminary hearing, Bray did not produce the surveillance log that Deputy Mosley had prepared after Plank's illegal intrusion and did not mention Plank's illegal intrusion onto the ranch on the afternoon of April 3. Lacertoso testified that after he discontinued surveillance of the van in Tehachipi; he went back to Deputy Mosley's location which was near the ranch. Lacertoso testified that he could not remember what observations Mosley related to him.

At trial, Mosley reported his observations about what

happened at the ranch while the van was in town, namely that Plank had jumped the fence surrounding the ranch, entered the ranch and investigated and observed what was going on at the ranch. The Petitioners moved for a renewed suppression hearing, which was granted.

At the renewed suppression hearing, Bray, Lacertoso, Plank and Miller testified differently than their former testimony in light of the information provided by Mosley. Although the trial court noted that, "the officers' conduct in surreptitiously entering the ranch and suppressing the fact" held the entire system up to ridicule, and Bray's and Lacertoso's testimony was "obfuscatory at best and bordered on absolute lying," the Petitioners' suppression motion was again denied. The court found these Petitioners did not have standing to assert a Fourth Amendment right to the premises. Petitioners were subsequently convicted in the case entitled *People v. Abelardo Gamboa et al.*, Kern County Superior Court Case Number 45981. Petitioners were sentenced to terms ranging between 15 to 21 years and were remanded to custody in state prison.

Petitioners' appeal was heard by the California Court of Appeals for Fifth Appellate District. In the Opinion, the Court reversed and overturned Petitioners' convictions. Medina and Chavez had served 30 months in state prison while Torres was released several months later.

The unpublished opinion states, "The real problem in this case is created by the massive contradictions between the testimony of the investigating officer at the preliminary hearing and trial compared to the renewed suppression hearing after Deputy Mosley's disclosures." The Court was troubled by Bray's failure to turn over Mosley's surveillance log and the fact that Bray knew about the results of Plank's visit to the ranch. "Bray also admitted that the decision to stop the vehicles was made on

the evening of April 3rd, after he debriefed Plank, because Plank wanted to be in on the stop. This completely refutes Bray's preliminary hearing testimony that he decided to stop the vehicles based on [Deputy] Medina's[2] observations that all the lights had been shut off at the ranch and everyone was leaving." "As for Lacertoso, there isn't very much left of his testimony that could be considered credible. His preliminary hearing testimony now appears to have been carefully crafted to avoid any possible reference to his activities during the Tehachipi surveillance, his communications with Bray, and the information obtained from Plank." "Plank's testimony is similarly suspect since he confined his preliminary hearing responses only to the March cattle theft investigation" and left out his entry on the ranch of April 3, 1991 and his involvement in the arrest of Petitioners.

The appellate court also criticized Miller's action during the investigation. "At the renewed suppression hearing, Miller sought to back away from his positive identification of Medina in the hardware store and vaguely claimed that he really didn't get a good look at the suspects. If this testimony is accepted, then even the tenuous link between Abel Medina, the white van, and the ranch . . . evaporates." The court concluded, "Unfortunately, the record is replete with Bray's inconsistent, misleading and untruthful statements so that it is difficult to determine what he *really* knew on the morning of April 4th." The court then concluded that because Bray's decision to stop the vans was either based upon Plank's illegal incursion or upon a hunch without a sufficient factual basis, the evidence should have been suppressed and the convictions were reversed.

Petitioners were released from prison and filed this cause of action. On or about June 7, 1994, Medina, Torres and Chavez

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2. A deputy sheriff named Medina not the Petitioner.

filed a complaint in the United States District Court for the Central District of California alleging that Miller, the County of Kern, Earl Bray, a Kern County deputy sheriff, John Lacertoso, a Kern County deputy sheriff, and J.C. Plank, Kern County deputy sheriff violated Petitioners' constitutional rights pursuant to the Fourth and Fourteenth Amendments by searching and seizing the persons and property of the Petitioners. On or about October 24, 1994, Petitioners filed a request that the district court take judicial notice of a California Court of Appeal opinion in the matter of *People v. Gamboa,* Case No. F017155 dated June 9, 1994 (hereafter "Opinion").

On or about April 7, 1995, Petitioners filed a Motion for Summary Judgment, or in the alternative, Summary Adjudication of the Issues. On May 5, 1995, the court denied Petitioners' motion. Although the court did not address the issue of whether it had taken judicial notice of the California Court of Appeal opinion, the court held that collateral estoppel did not apply in this matter because the Respondents were not parties or in privity with the People (prosecutor) in the state court criminal matter.

On or about September 11, 1995, Petitioners submitted proposed jury instructions which included a special jury instruction, pursuant to **Federal Rules of Evidence, Rule 201,** regarding the effect of taking judicial notice of the Opinion. On or about September 11, 1995, Petitioners submitted their exhibit list which included as Exhibit 1, the Opinion. Upon being offered as evidence with proper foundation, the court sustained an objection to admit the Opinion into evidence. Upon a verdict by the jury after a trial, a judgment in favor of Respondents was entered on November 21, 1995. A timely notice of appeal was filed.

On or about May 15, 1997, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. The Court of Appeals held:

> [T]he question of the illegality of the search and arrest is not equivalent to the question of whether Respondents will ultimately be held liable. Even if Respondents' conduct had violated Petitioners' constitutional rights, the jurors were entitled to find the Defendants were shielded by qualified immunity because they reasonably believed that they were acting lawfully, and the jury in fact so found.

Upon Petitioners' request for rehearing, the Court of Appeals held that judicial notice was not appropriate; whether there was probable cause is not an adjudicative fact.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ: (1) in order to resolve a split between the federal circuit courts of appeals on two important questions concerning a plaintiff's rights in pursuing 42 U.S.C. § 1983 claims against peace officers; (2) because a court of appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision; and (3) because a United States Court of Appeals has decided an important question of federal law which has not been but, should be settled by the Supreme Court, and has decided a federal question in a way that conflicts with the applicable decisions of the Supreme Court.

"[U]nder the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior action. One who is not a party of record may be bound if he has sufficient interest and participated in the prior action." *Montana v. United*

States, 440 U.S. 147 (1979). Collateral estoppel is applicable even if one of the suits is in state court and the other is in federal court. *Allen v. McCurry*, 449 U.S. 90 (1980). In *Parklane Hosiery*, 439 U.S. 322 (1979) this Court approved of the use of offensive collateral estoppel. The doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity to an earlier action. *Chicago Rock Island & Pacific Railroad Co. v. Schendel*, 270 U.S. 611 (1926). "Privity is a concept not readily susceptible of uniform definition. Traditionally it has been held to refer to an interest in the subject matter of litigation acquired after rendition of the judgment through or under one of the parties, as by inheritance, succession or purchase. (citation omitted). The concept has also been expanded to refer to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights (citations omitted) and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." (citations omitted). *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.*, 120 Cal. App. 3d 622.[3]

Now twenty years later, the district court refused to permit Petitioners to utilize this doctrine to prevent relitigation of an issue decided in a state court in spite of the fact that the state court decision was a final decision, fully litigated through the state court of appeals and a party who had the community of interests and virtually represented respondents.[4]

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3. The reason for citing a California case as authority for the doctrine of collateral estoppel is that the state law of collateral estoppel governs not federal law. *Ayers v. City of Richmond*, 895 F.2d 1267 (9th Cir. 1990).

4. The Attorney General of the State of California represented the "People" in the criminal appeal and is representing Respondents in this matter.

Rule 201 of the Federal Rules of Evidence codified the doctrine of judicial notice. Only adjudicative facts are subject to judicial notice. Adjudicative facts are those that immediately affect only the specific litigants in the action. Questions of adjudicative fact must be resolved on the basis of the evidentiary submissions of the parties and they are the types of questions that in a trial would normally be submitted to a jury, or to a judge as the finder of facts. 1 K. Davis, *Administrative Law Treatise* § 7.02 (1958); *Patagonia Corporation v. Board of Governors of the Federal Reserve System,* 517 F.2d 803 (9th Cir. 1975). "The court will focus on legislative facts — those applicable to the entire class of cases — rather than adjudicative facts — those applicable only to the case before it. . . . APA [Administrative Procedure Act] defines adjudicative facts as 'facts pertaining to the parties and their businesses and activities.' " *National Organization for Women v. Social Security Administration of the Department of Health and Human Services,* 736 F.2d 727 (1984) (quoting Professor Davis at 2, *Administrative Law Treatise* (2nd Ed. 1979)).

In *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,* 971 F.2d 244 (9th Cir. 1992), the federal district court took judicial notice of a decision of the California Supreme Court.

In the case at bar, the Court of Appeals held that the determination of whether probable cause exists is not an adjudicative fact and thus judicial notice was not appropriate. The determination of probable cause involves the facts concerning the activities of only the peace officers involved in the arrest. Who did what to whom, when and why? These are adjudicative facts who are subject to judicial notice.

The result in unsupported by any case law or statute and is contrary to *Columbus Line, Inc. v. Gray Line Sight-Seeing*

Companies Associated, Inc. and *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.* The result permits a peace officer who has been found to have violated the Fourth Amendment rights of a person by arresting him without probable cause to argue in a subsequent action that there was probable to cause to arrest. The result permits two diametrically different decisions based on the same identical facts involving exactly the same persons.

I.

A PEACE OFFICER, WHO IS A DEFENDANT IN A 42 U.S.C. § 1983 ACTION, IS COLLATERALLY ESTOPPED FROM LITIGATING THE ISSUE OF PROBABLE CAUSE WHERE A STATE COURT HAS FOUND THAT THERE WAS NO PROBABLE CAUSE TO ARREST THE PLAINTIFF.

The issue of whether probable cause exists is a legal issue based on the evidence presented to the trier of fact. In a criminal proceeding, the issue of whether probable cause existed is determined by the court not the jury. Where there are material issues of fact in dispute, the court makes the determination of whether probable exists after a resolution of the adjudicative facts. "In reaching that determination, we reasoned that the issue of whether a confession is voluntary also requires the application of adjudicative facts to a legal standard and presents the same need for uniformity of meaning and consistency of application that the Supreme Court had encountered in Ornelas with respect to the determinations of reasonable suspicion and probable cause." *United States v. Mills,* 1997 U.S. App. Lexis 21118 (7th Cir.).

Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law

necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States,* 440 U.S. 147, 153 (1979). Changes in the burden of proof do not prevent the applications of issue preclusion. *Curtis v. Eikenberry,* 877 F.2d 802, 803, (9th Cir. 1989). "State law governs the application of collateral estoppel or issue preclusion to a state court judgment in a federal civil rights action." *Ayers v. City of Richmond,* 895 F.2d 1267, 1271 (9th Cir. 1990). Therefore, both the district court and the court of appeals should have looked to California law rather than federal law to determined the issue of collateral estoppel.

"The doctrine of res judicata provides that a final judgment on the merits bars the parties or those in privity with them from litigating the same cause of action in a subsequent proceeding and collaterally estops parties or those in privity with them from litigating in a subsequent proceeding on a different cause of action any issue actually litigated and determined in the former proceeding. [Citations omitted.] The application of the doctrine in a given case depends upon an affirmative answer to three questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? [Citations omitted.]" *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.,* 120 Cal. App. 3d 622, 628-629 (1981).

The first two prongs of the *Columbus Line* test are easily met in that the issue of probable cause was the issue in a suppression hearing and the subject of an appeal to the California Court of Appeal and there was a final judgment on the issue. The third prong of the test is the issue in the instant case: are these defendants in privity with or do they have a community of

interests with the State of California and the County of Kern. "A party technically not a party to the prior action may be bound by the prior decision if his interests are so similar to a party's that that party was his 'virtual representative' in the prior action." *United States v. ITT Rayonier,* 627 F.2d 996 (9th Cir. 1980); *Aerojet-General v. Askew,* 511 F.2d 719 (5th Cir. 1975). The virtual representation may be based on an express or implied legal relationship. California has adopted this view of community of interests. *People v. Sims*, 32 Cal. 3d 468 (1982); *Lewis v. County of Sacramento,* 218 Cal. App. 3d 214 (1990). "The courts have held that the agents of the same government are in privity with each other since they represent not only their own rights but the right of the government." *Sims, supra* at 487.

Three of the Respondents are employees of Kern County who also employed the district attorney who prosecuted the Petitioners in the state criminal matter. Respondent Miller is an employee of the State of California, Department of Justice who is the exact same governmental entity that handled the state appeal and this matter in the United States District Court and Ninth Circuit Court of Appeals. The four individual Respondents were more than mere witnesses in the state criminal case; they were the arresting officers, they aided the district attorney in its preparation of the prosecution, they were present in the courtroom as "investigating officers" during the trial and testified as witness on a number of occasions. It was their contradictory testimony which disclosed to the trial judge their ". . . conduct in surreptitiously entering the ranch and suppressing the fact" held the entire system up to ridicule, and Bray's and Lacertoso's testimony was "obfuscatory at best and bordered on absolute lying." In spite of the fact that the California Court of Appeal has determined that there was not probable cause to arrest, the district court placed the issue of probable cause before the jury which reached a different result than the California Court of Appeals.

The central purpose of collateral estoppel is to prevent different results by different courts based on the same facts involving the exact same persons. That has been the result in this case; the state court determined probable cause did not exist while a federal court took the opposite view.

II.

A FEDERAL COURT MUST TAKE JUDICIAL NOTICE OF A STATE COURT DECISION AND MUST BE GIVEN FULL FAITH AND CREDIT TO A STATE COURT JUDGMENT.

Rule 201 of the Federal Rules of Evidence provides that a court, when requested, must take judicial notice of an adjudicative fact which is one not subject to reasonable dispute which is either generally known within the jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Federal courts may take judicial notice of proceedings outside the federal judicial system if the proceedings have a direct relation to the matters at issue. *Green v. U.S. Penitentiary Warden*, 699 F.2d 364 (7th Cir. 1983). Accordingly, federal courts have taken judicial notice of court records, acts and proceedings in state court cases. *In re Phillips*, 593 F.2d 356 (8th Cir. 1979). The court may properly consider those matters which are a public record such as those documents on file in the courts of the State of California. *Mac v. South Bay Beer Distributors*, 798 F.2d 1282 (9th Cir. 1986). In a case directly on point, *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (1992), the Ninth Circuit held that the federal district court properly took judicial notice of a decision of the California Supreme Court.

> Generally, we will not consider facts outside the record developed before the district court. (citation omitted) However, we "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." (citations omitted except Bryant v. Carleson, 444 F.2d 353, 357 (9th Cir.) cert. denied, 404 U.S. 967, 92 S. Ct. 344, 30 L. Ed. 2d 287 (1971) (court took judicial notice of proceedings and filings in other courts, including a decision of the California Supreme Court issued while the parties' appeal in the federal case was pending)
>
> The proceedings before the California Superior Court are "directly related" to this appeal and may in fact be dispositive. Accordingly, we take notice of that court's final judgment, Clear Lake Indian Bingo Ltd. v. Robinson Rancheria Citizens Council, No. C 718613, (California Superior Court, December 28, 1990), and related filings.

United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d at 248.

The adjudicative facts of which the court must take judicial notice of are simply the ultimate facts of the particular case. "When a court . . . finds facts concerning the immediate parties — who did what, when, how, and with what motive or intent — the court . . . is performing an adjudicative function, and the facts are conveniently called adjudicative facts . . ." "Stated in other terms, the adjudicative facts are those to which the law is

applied in the process of adjudication . . . They relate to the parties, their activities, their properties, their businesses." 2 *Administrative Law Treatise* 353. An adjudicative fact is a certain fact of such a nature that a court, together with all men, has knowledge thereof without first having its attention directed thereto, while as to other facts a court may be without knowledge but will take judicial notice thereof if its attention is directed thereto. *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (10th Cir. 1946).

On or about October 20, 1994, Petitioners lodged with the court the "Opinion of the California Court of Appeal in People v. Gamboa, Case No. F017155" and requested the court take judicial notice of the "Opinion." The request was made in contemplation of a motion for summary adjudication of the issues by Petitioners, for purposes of attempting to limit the scope of a trial and/or, if a trial became necessary, having the jury instructed that the issue of probable cause has been conclusively decided and there was not probable cause to arrest or enter the ranch. Although the court gave no formal indication of whether it granted or denied the request, the court used and considered the "facts" contained in the Opinion in its consideration and decision of Petitioners' motion for summary judgment.

The Opinion of the California Court of Appeal in *People v. Gamboa,* Case No. F017155 meets all the criteria for the taking of judicial notice. It is an adjudicative fact which is "not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Opinion is directly related to this cause of action in that prior action arises out of the same transactions and events.

The Court of Appeals held that "Judicial notice is not

appropriate; whether there was probable cause is not an adjudicative fact." Without any authority or explanation, the court held that the factors on which a court determines whether probable exists and/or whether probable cause exists is not an adjudicative fact. The Seventh Circuit has held "[I]n reaching that determination, we reasoned that the issue of whether a confession is voluntary also requires the application of adjudicative facts to a legal standard and presents the same need for uniformity of meaning and consistency of application that the Supreme Court had encountered in Ornelas with respect to the determinations of reasonable suspicion and probable cause." *United States v. Mills,* 1997 U.S. App. Lexis 21118 (7th Cir.). The facts underlying the determination of whether probable cause exists are adjudicative facts as is the whether probable cause exists. A court in determining whether probable cause exists must weigh and determine the facts of that case; once the court determines what the facts are, the facts become adjudicative facts and are subject to judicial notice.

The determination that the underlying facts in the determination of probable cause and whether probable cause itself exists, are not adjudicative facts is unsupported by any evidence, case law and rule of evidence. To the contrary, the general rule is that the underlying facts in the determination of probable cause and whether probable cause itself exists, are adjudicative facts and subject to judicial notice when requested by a party.

CONCLUSION

For the foregoing reasons, Petitioner prays the Court grant a Writ of Certiorari.

Respectfully submitted,

RICHARD HAMLISH
Counsel of Record
Attorney for Petitioners
910 Hampshire Road, Suite X
Westlake Village, CA 91361
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Dated: September 29, 1997

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 15, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56805

D.C. NO. CV-94-03801-WJR

ABEL BERNARD MEDINA; BENJAMIN TIBURICO-TORRES; JESUS MANUEL CHAVEZ;

Plaintiffs-Appellants,

v.

EDWARD MILLER, individually and as an agent for the State of California Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARL BRAY, individually and as a detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a Sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a deputy for the Kern County Sheriff's Department.

Defendants-Appellees.

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding
Argued and Submitted May 7, 1997
Pasadena, California

Before: BROWNING and SCHROEDER, Circuit Judges, and RESTANI, U.S. Court of International Trade Judge.**

Abel Bernard Medina, Benjamin Tiburico-Torres, and Jesus Manuel Chavez, appeal from the pre-trial denial of their motion for summary judgment, after a jury verdict against them in their 42 U.S.C. § 1983 action. Appellants contend that the individual defendants-appellees violated their constitutional rights in an unlawful search and seizure and an arrest not supported by probable cause. The appellants' criminal convictions were overturned after the California Court of Appeal ruled that the government had not demonstrated probable cause. The appellants' principal contention is that the district court should have ruled as a matter of law in their favor on the issue of liability. Their theory is that the California court ruling precludes the individual appellees from relitigating the issue of probable cause.

The appellees contend that we lack jurisdiction to consider the issue because it was squarely raised in a motion for summary judgment that was denied before trial and is, therefore, not now appealable. *General Signal v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1506 (9th Cir. 1995) (citing *Lum v. City & County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992); *Locricchio*

** The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987), *cert. denied*, 116 S. Ct. 1017 (1996)). We conclude, however, that by offering jury instructions that effectively sought a directed verdict on the issue of the legality of the appellees' conduct, the appellants have adequately preserved the collateral estoppel question for our review.

We must, however, affirm the district court's judgment on the merits. The district court relied upon federal cases that squarely hold that individual law enforcement officers are not collaterally estopped by state court judgments that reverse criminal convictions on constitutional grounds. *See Davis v. Eide*, 439 F.2d 1077 (9th Cir. 1971); *Duncan v. Clements*, 744 F.2d 48 (8th Cir. 1984).

Appellants correctly point out that the controlling law for us to follow is California law, rather than federal law, but the principles are the same. Under California law, "a party will be collaterally estopped from relitigating an issue only if (1) the issue decided in the prior adjudication is identical with that presented in the action in question; and (2) there was final judgment on the merits; and (3) the party against whom the plea is asserted is a party in privity with the party to the prior adjudication." *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 874 (1979) (citing *Bernhard v. Bank of America*, 19 Cal.2d 807, 819 (1942)). "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." *Clemmer*, 22 Cal.3d at 875 (citations omitted). *See also Restatment (Second) of Judgments* § 39 (1982).

In this case, the individual appellees were not parties to the criminal case; there is no indication that they controlled that litigation; and the burden of proof in the criminal case was on the government to show the lawfulness of the search and arrest, whereas the burden of showing the unlawfulness in this civil action is upon the individual appellants. *Griffin v. Strong*, 739 F. Supp. 1496 (D. Utah 1990). Moreover, contrary to appellants' suggestions at trial and before this court, the question of the illegality of the search and arrest is not equivalent to the question of whether appellees will ultimately be held liable. Even if the appellees' conduct had violated appellants' constitutional rights, the jurors were entitled to find that appellees were shielded by qualified immunity because they reasonably believed that they were acting lawfully, and the jury in fact so found.

The County of Kern, although still denominated as a defendant-appellee, was granted summary judgment because appellants' failed to show *Monell* liability. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Appellants do not challenge that ruling on appeal.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 30, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56805

D.C. NO. CV-94-03801-WJR

ABEL BERNARD MEDINA; BENJAMIN TIBURICO-TORRES; JESUS MANUEL CHAVEZ;

Plaintiffs-Appellants,

v.

EDWARD MILLER, individually and as an agent for the State of California Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARL BRAY, individually and as a detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a Sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a deputy for the Kern County Sheriff's Department.

Defendants-Appellees.

ORDER

Before: BROWNING and SCHROEDER, Circuit Judges, and RESTANI, U.S. Court of International Trade Judge.*

---

* The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

Appendix B

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the sugggestion for rehearing en banc and no judge of the court has requested a vote on the suggested for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied. Judicial notice is inappropriate; whether there was probable cause is not an adjudicative fact. The suggestion for rehearing en banc is rejected.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA DATED MAY 5, 1995 WITH ATTACHMENTS

B.C. Barmann, COUNTY COUNSEL
COUNTY OF KERN, STATE OF CALIFORNIA
By James H. Thebeau, Deputy (Bar # 128845)
Administrative Center
1115 Truxtun Avenue, Fourth Floor
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Attorney for Defendants, COUNTY OF KERN, EARL BRAY, JOHN LACERTOSO and J.C. PLANK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 94-03801-WJR

ABEL BERNARD MEDINA, ABELARDO GAMBOA, BENJAMIN TIBURICO TORRES AND JESUS MANUEL CHAVEZ;

Plaintiffs,

vs.

EDWARD MILLER, individually and as an agent for the State of California Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARL BRAY, individually and as a detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a deputy for the Kern County Sheriff's Department; and DOES 1-100 inclusively,

Defendants.

Appendix C

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES

The motion of plaintiffs, ABEL BERNARD MEDINA; BENJAMIN TIBURICO-TORRES, Abelardo Gamboa, and JESUS MANUEL CHAVEZ, for summary judgment or summary adjudication of issues came on regularly for hearing before the court on May 1, 1995, the Honorable William J. Rea presiding. The plaintiffs were represented by Richard Hamlish, Esq. The defendants, COUNTY OF KERN, EARL BRAY, JOHN LACERTOSO and J.C. PLANK were represented by B.C. Barmann, Sr., Kern County Counsel, by James H. Thebeau, Deputy County Counsel. Defendant Edward Miller made no appearance.

Having considered the moving and opposition papers filed by all parties, the oral argument of the parties, all the admissible evidence submitted to the court and the inferences reasonably deducible therefrom, for reasons set forth in the attached Tentative Ruling,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion is denied.

Dated: _____

_____

William J. Rea, Judge
U.S. District Court
Central District of California

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 94-3801 WJR (JRx)

Docket Number: 3

Date: May 1, 1995

Nature of Motion: Plaintiffs' Motion for Partial Summary Judgment or Summary Adjudication on the Issue of Liability.

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

The Court is inclined to DENY plaintiffs' Motion for Summary Judgment.

DISCUSSION

"The doctrine of collateral estoppel may be applied in a § 1983 suit to preclude relitigation of a federal constitutional issue decided in state criminal proceedings." *Duncan v. Clements*, 744 F.2d 48, 51 (8th Cir. 1984) (citing *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)).

Appendix C

A fundamental principle of collateral estoppel is that the party against whom collateral estoppel is asserted must have been a party to or in privity to a party to the action that formulates the basis for asserting collateral estoppel. *Id.* Plaintiffs argue here that "defendants in the instant action are all in privity with the State of California and/or the County of Kern[.]" Plaintiffs' Memorandum of Points and Authorities in support of Motion for Partial Summary Judgment at 16.

Defendants, however, cite *Davis v. Eide,* 439 F.2d 1077 (9th Cir. 1971), to support their argument that collateral estoppel does not apply in this case.

In *Davis,* plaintiff brought a § 1983 claim against two Los Angeles City policemen to recover damages for violations of plaintiff's Fourth Amendment rights. In the criminal proceedings, plaintiff was convicted, but the California Court of Appeal reversed. In the civil action, the District Court submitted to the jury the question of whether probable cause existed to arrest plaintiff. Plaintiff argued that the District Court erred because the probable cause issue had been resolved in plaintiff's favor during the state proceedings and thus, defendants were collaterally estopped from disputing the issues in the civil action.

The Ninth Circuit rejected plaintiff's argument. The *Davis* court first explained that privity is defined to include "those who control an action although not parties to it * * *; those whose interests are represented by a party to the action * * *; [and] successors in interest * * *." *Id.* at 1078.

The court then concluded that "defendants were city police officers not directly employed by the state; they had no measure

of control whatsoever over the criminal proceedings and no direct individual personal interest in its outcome. In these circumstances there was no privity sufficient to invoke the doctrine of collateral estoppel." *Id.*

The *Duncan* case, *supra,* also supports defendants' argument. In *Duncan,* the Eighth Circuit explained that the State of Missouri was a party to the plaintiff's criminal proceedings and not the individual police officer. *Duncan,* 744 F.2d at 52. The court also stated that "merely because a person 'happen[s] to be interested in the same question, or in proving or disproving the same state of facts' " does not mean the two are in privity. *Id.* (citation omitted).

Moreover, the interests of the state in a criminal action "are not identical to those of an individual officer[.]" *Id.* The criminal forum is concerned with vindicating the "public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." *Id.* (quoting *United States v. Standefer,* 447 U.S. 10, 25, 100 S.Ct. 1999, 2008, 64 L.Ed.2d 689 (1980)). The civil forum, however, is concerned with ascertaining private rights.

Furthermore, an individual police officer has no control over the state's presentation of its criminal case. *Id.* The police officer also does not have a personal interest in the outcome of the case, and, more importantly, the police officer can not appeal the state court's decision regarding the evidentiary objections.

In light of the *Davis* and *Duncan* opinions, the Court is inclined to hold that plaintiffs may not assert collateral estoppel against the defendants here.

Appendix C

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF KERN

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action, my business address is 1115 Truxtun Avenue, Fourth Floor, Bakersfield, CA 93301.

On **May 3, 1995,** I had served the foregoing document(s) described as **ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES** on the interested parties in this action:

* * *

X by placing __ the original X a true copy thereof enclosed in sealed envelopes addressed as follows:

Richard Hamlish, Esq.
LAW OFFICES OF RICHARD HAMLISH
910 Hampshire Road, Suite X
Westlake Village, CA 91361-2804

David Adida, Deputy Attorney General
Office of the Attorney General
State of California
300 South Spring Street, Fifth Floor
Los Angeles, CA 90013

X **BY MAIL**

* * *

Appendix C

X As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **May 3, 1995,** at Bakersfield, California.

* * *

X (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

KAREN M. KITCHEN
NAME

s/ Karen M. Kitchen
SIGNATURE

(2)

No. 97-565

FILED
OCT 30 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ABEL BERNARD MEDINA, BENJAMIN TIBURICO TORRES and JESUS MANUAL CHAVEZ,
Petitioners,

vs.

EDWARD MILLER, individually and as an Agent for the State of California, Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARLY BRAY, individually and as a Detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a Sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a Deputy for the Kern County Sheriff's Department,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
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23 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly upheld the District Court's decision, in spite of findings by a state appellate court that petitioners' arrests were illegal, not to preclude respondents from relitigating the legality of petitioners' arrests on the grounds that respondents state police officers did not have a fair opportunity to litigate that issue during the criminal proceedings, and that they were not in privity with the State of California simply by virtue of the officers working in concert with the prosecutor and testifying during the criminal proceedings?

2. Whether the Court of Appeals properly upheld the District Court's decision not to take judicial notice of the facts stated in the state court's unpublished opinion dismissing petitioners' criminal charges on the ground that they were not indisputably true?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE[1/]

On or about January 1991, a confidential informant advised respondent Ed Miller, an investigator with the California Department of justice, Bureau of Narcotics (hereinafter referred to as "Miller") that he knew petitioner Abel Bernard Medina (hereinafter referred to as "Medina") was involved in the manufacture of PCP at a ranch owned by Medina's parents in the Stallion Springs area of Southern California. At the time, Medina had a "no bail" warrant for a probation violation, issued on April 25, 1990, by Los Angeles County Superior Court.

On the morning of April 2, 1991, Miller was told by that same informant that Medina and three hispanic males had traveled, on or about March 31, 1991, to the elder Medina's ranch in Stallion Springs specifically to manufacture P.C.P., and that they had commuted in two vehicles, one of which was a gray van belonging to Medina. They intended to stay in Stallion Springs for a few days, and return to Los Angeles with the manufactured PCP.

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1. Petitioners' Statement of the Case contains many mistatements of fact. The limited record in the Court of Appeals did not include witnesses' testimony about the underlying facts of this litigation. What follows is a summary of the officers' testimony at trial.

On April 2, 1991, Investigator Bray of the Kern County Sheriff's Department, went to the elder Medina's ranch and saw two hispanic males talking in proximity of two parked vehicles, one of which was a gray colored van. The other was a white newer van. Respondents Miller, Bray and other members of the Sheriff's Department, established surveillance of the ranch.

On April 4, 1991, the white van was followed by a surveillance team to the city of Tehachapi, where respondent Miller followed some hispanic males into a hardware store. One of them matched the description of Abel Medina, but Miller could not identify him positively. Meanwhile, back at the ranch, Deputy Plank entered Medina's property by climbing over the gate. He walked up the dirt driveway toward the house and garage where he detected a chemical odor consistent with PCP. At no time prior to the petitioners' trial was Miller informed of Plank's trespass.

On April 4, 1991, Miller was awaken at 4:35 a.m. and told that the two vans had left Medina's ranch, and that they would be followed by the surveillance team. Miller left his hotel to join them, and finally caught up with the team as Deputies Yorke and Kane stopped the gray van, by order of Investigator Bray. Miller believed the gray van had been stopped on the suspicion that Medina was inside the vehicle. The gray van did contain Medina, as well as PCP and chemicals used to manufacture PCP. Shortly thereafter, the

white van was stopped. It too contained PCP and chemicals used to make PCP. The vans' passengers were all arrested on drug related charges, i.e., manufacturing, transporting, and/or possessing PCP.

During the petitioners' criminal trial, the prosecutor refrained from introducing in evidence most, if not all, of the information passed on to law enforcement by the confidential informant for fear of revealing his identity and endangering his life. Nevertheless, the jury found petitioners guilty of manufacturing, transporting, and/or possessing PCP. Petitioners appealed the verdict to the California Court of Appeal for the Fifth Appellate District, which, in an unpublished opinion, reversed petitioners' convictions on the grounds that the incursion of Deputy Plank onto the elder Medina's property was illegal, invalidating the petitioners' arrests, and that "even if Plank's information played no role in Bray's decision [to arrest petitioners]," there was no probable cause, on the basis of the limited evidence presented at trial by the prosecutor, to believe that Medina, wanted on an outstanding felony warrant, was in one of the vehicles stopped by the officers.

Thereafter, petitioners filed this section 1983 claim against respondents claiming that the officers violated their Fourth Amendment rights. At trial, petitioners sought to use their acquittal as a preclusive determination there was no probable cause for the officers' actions. Petitioners argued the issue of the respondents' liability should be resolved in their favor

and needed not be sent to the jury. The District Court, however, allowed the probable cause issue to be relitigated, ruling that collateral estoppel would be improper because there was no evidence that (1) respondents, who were not parties to the state criminal proceeding, either had control over or substantially participated in the control of the prosecutor's presentation of the case, and (2) respondents did have a fair opportunity to litigate the issue of probable cause during the criminal proceedings.

Also, petitioners argued that the District Court should take judicial notice of the truth of the facts stated in the unpublished state appellate opinion. The Court refused to do so. After hearing the evidence, the jury returned a verdict in favor of respondents.

The United States Court of Appeals for the Ninth Circuit upheld the District Court's rulings, holding that collateral estoppel would have been improper as there was no privity between the respondents and the parties in the criminal proceeding; the rules of law and burdens of proof in the criminal and civil cases were substantially different; and respondents did not have a fair opportunity to litigate the issue of probable cause during the criminal proceeding. Finally, the appellate court ruled that even if respondents' conduct had violated petitioners' rights, the jurors were entitled to find that respondents were shielded by qualified immunity because they reasonably believed that they were acting lawfully, and the jury in fact so found.

REASONS FOR DENYING THE WRIT

Petitioners misrepresent the parties and events involved in their arrests and subsequent prosecution, and misinterpret the applicable legal standards and rules. To grant this Petition would result in a miscarriage of justice.

A. Collateral Estoppel

Petitioners maintain that respondents were estopped from relitigating the legality of their arrests because there was privity between the prosecutor from the County of Kern, the Attorney General's Office, who handled the criminal appeal, and the respondents, who arrested them and testified at the criminal proceedings, because they were all agents of the State of California with the shared goal of convincting them. Petitioners' argument is flawed for several reasons.

Under California law[2], collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding. People v. Sims (1982) 32 Cal.3d 468, 477; Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 604. "Traditionally, [courts] have applied the doctrine only if several threshold requirements are fulfilled. First,

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2. A federal court applies the state law of preclusion when determining the preclusive effect of a state court decision. Migra v. Warren City School District Board of Education, 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984).

the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." Lucido v. Superior Court (1990) 51 Cal.3d 335, 341. Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles. Id. at 339.

Here, the final condition for the application of collateral estoppel was not met: respondent Miller was not a party, or in privity with, the party to the former proceeding. The State of California, not Miller, was a party to petitioners' criminal proceedings. Petitioners, however, argue that since respondent Miller is a state police officer and the State of California, in whose name the criminal action was instituted, was a party to the earlier criminal action, Miller should be treated the same as the State, and since the State would have been collaterally estopped, he should also be. Further, petitioners argue that since the California Attorney General's Office represented the State of California at the state appellate level, and represent respondent Miller here, Miller should be precluded from relitigating the probable cause issue.

While there is a simplistic attraction to petitioners' argument, nevertheless it must be rejected because a police officer, such as respondent Miller, is neither a party[3] nor in privity with the prosecuting entity in criminal proceedings. Likewise, a police officer does not not have a full and fair opportunity to litigate issues raised in criminal proceedings. Davis v. Eide, 439 F.2d 1077, 1078 (9th Cir. 1971) (where conviction was reversed, defendant police officers in Section 1983 case did not have privity with state during prior criminal proceeding for purposes of plaintiff's invoking collateral estoppel on the issue of lack of probable cause); Warren v. Byrne, 699 F.2d 95 (2d Cir.1983) (same); Duncan v. Clements, 744 F.2d 48 (8th Cir.1984) (same); Schwab v. Wood, 767 F. Supp. 574, 583 (D. Del. 1991) (collateral estoppel improper where police officers had no control over or substantially participated in the state's presentation of criminal case, the prosecutor represented the interests of the state and not the officers' in the criminal proceeding, and the officers had no opportunity to

---

3. Moreover, petitioners' argument overlooks one essential fact. In their complaint, they allege that "all defendants are sued in their official and personal capacities." Respondent Miller is not only being sued in his capacity as a government employee, but is also being sued in his individual capacity. The mere fact that the California Attorney General's Office represented the State of California at the criminal proceedings and respondent Miller in this civil action does not establish that the State of California is the only litigant to this action. Rather, Miller, who is being sued in his own individual capacity, is also a separate and independent party in his own right.

engage in any discovery or assert any defense which could shield them from civil liability during the criminal proceeding); Griffin v. Strong, 739 F. Supp. 1496, 1502 (D.Utah, 1990) (same); Spartacus Youth League, 502 F.Supp. 789 (N.D.Ill.1980) (same).

Privity, within the meaning of the doctrine of collateral estoppel, does not exist merely because a person happens to be interested in the same question, or in proving or disproving the same state of facts. Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 874 (1979). It is not enough that both the State of California and respondent Miller were interested in proving that probable cause existed to make the arrests and conduct the search and seizure. "Privity within the meaning of the doctrine of issue preclusion is privity as it exists in relation to an identity of interests in the subject matter of the litigation." Id.

The interests of the State of California in the underlying criminal proceedings were not identical to those of respondent Miller. Wyler v. United States of America, 725 F.2d 156 (2d Cir. 1983) (collateral estoppel improper where DEA agents were not parties to the criminal proceeding because the interests of prosecutors in a criminal proceeding are not identical to those of individual officers); Davis v. Eide, 439 F.2d 1077, 1078 (9th Cir.1971) (same). In a different context, this Court has noted: "'The purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the

criminal law while at the same time safeguarding the rights of the individual defendant.'" United States v. Standefer, 447 U.S. 10, 25, 64 L. Ed. 2d 689, 100 S. Ct. 1999 (1980) (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3rd Cir. 1979) (defendant accused of aiding and abetting in commission of criminal offense may be convicted despite the prior acquittal of the alleged perpetrator)).

Only the State of California, not respondent Miller, had an interest in the outcome of the criminal prosecution; Miller's personal interests were not at stake. Schwab v. Wood, 767 F.Supp. 574 (D.Del.1991) (police officers did not have an interest which was bound by the previous criminal proceedings; they simply had no direct personal interest whatsoever in the state criminal proceedings); Griffin v. Strong, 739 F.Supp. 1496 (D.Utah 1990) (same).

Petitioners, seeking to find privity by the use of generalization, conclude that since the prosecutor, the Attorney General's Office, and the respondents were agents of the State of California and had an interest in protecting the public from petitioners, they were in privity. Respectfully, that logic would place the Governor, the Legislature, the public prosecutors, the Attorney General's Office, and any agency devoted to the protection of the public from criminals in privity as they represent state agencies and have an interest in protecting the public from criminal elements. In this case, the prosecutor from Kern County and the Attorney General's Office of necessity had their own

agenda in selecting the cases to prosecute, determining how to marshal and present the evidence, and whether to seek review of a potentially erroneous decision issued by the Court of Appeal. Both the prosecutor and the Attorney General's Office exist in a time of limited resources with crushing workloads and must set their own agendas independent of the police officers who worked on the case, effected the arrests, and testified at the criminal proceedings. There is absolutely no indication in this record the prosecutor or the Attorney General's Office were aware of or had any interest in furthering the officers' interests. To find privity for purposes of collateral estoppel on this record is to simply create it out of thin air.

Petitioners rely on People v. Sims, 32 Cal.3d 468 (1982) for the proposition that under California law governmental bodies and their officers are in privity for purposes of collateral estoppel. In Sims, a welfare recipient who had been exonerated of fraud charges in an administrative hearing conducted by the Department of Social Services of Sonoma County was subsequently prosecuted in a criminal proceeding for the same alleged misconduct. The issue presented in Sims was whether the Sonoma County District Attorneys' Office, which represented the party to be estopped, and the Social Services Department, the unsuccessful party in the prior litigation, were sufficiently close to warrant applying collateral estoppel. The court reasoned that they were because both entities were county agencies that represented the

interests of the State of California at the respective proceedings[4]. Thus, Sims is distinguishable because it simply involved the relationship between two governmental bodies closely associated with regard to the prosecution of the same alleged misconduct. This case presents an entirely different issue of the relationship between the State of California, acting in the public interest in a criminal proceeding, and a state police officer who is a witness in that proceeding.

More to the point, however, is People v. Meredith (1992) 11 Cal.App.4th 1548. Meredith was initially charged in the United States District Court with possession of cocaine base with intent to distribute (21 U.S.C. @ 841 (a)(2)). That charge was dismissed after the district court ruled that the evidence against Meredith had been obtained in violation of Meredith's rights under the Fourth Amendment. When Meredith was subsequently charged with state offenses, he moved under Penal Code section 1538.5 to suppress

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4. Moreover, it should be noted that Vehicle Code §§ 13353-59 were enacted in "reaction to People v. Sims, supra, 32 Cal.3d 468, which held that the results of administrative hearings could preclude criminal prosecution for welfare fraud. The Sims result was itself a policy decision, but one informed by the "unique statutory scheme" at issue there.... If, today, a defendant were to argue that a favorable administrative outcome collaterally estopped a criminal prosecution, and cited Sims to support the contention, the contrary legislative enactment would clearly prevail." Gikas v. Solin (1993) 6 Cal.4th 841, 851.

the evidence against him. The trial court denied the suppression motion.

On appeal from his conviction after a negotiated plea of guilty to one count of possession of cocaine base for sale, he argued that the People of the State of California were barred by collateral estoppel from relitigating the issues relating to the legality of his arrest. Privity, he argued, existed between the United States and the People of California, because the Los Angeles Police Department "represented the rights of the government, both state and federal" in both proceedings. The court rejected defendant's argument, reasoning:

> "This argument fails to appreciate that it was the United States Attorney and the District Attorney of Los Angeles County, not the police, state or federal, who had the authority to prosecute Meredith in behalf of their respective sovereigns, to determine how assiduously to press the prosecution, and to decide on the strategy to be used in the prosecution. (Gov. Code, @ 26501; People v. Gephart, supra, 93 Cal.App.3d at p. 999; Rosato v. Superior Court (1975) 51 Cal.App.3d 190, 226 [124 Cal.Rptr. 427]; U.S. v. Davis, supra, 906 F.2d at p. 834.)

Further, collateral estoppel was improper because respondent Miller clearly had no control over nor did he substantially participate in the control of the State's

presentation of its case. Petitioners assert, for example, that respondent Miller was represented by the state prosecutor throughout the criminal trial. That assertion is not supported by the facts. The prosecutor represented the State of California -- not Miller. Also, respondent Miller was not represented by his own attorney, and petitioners have made no showing that the prosecutor had the same interest(s) as Miller did, or that Miller played any role in any decision as to the criminal case, or even that he was capable on his own, without legal advice, to make appropriate decisions in regard to the determination of the Fourth Amendment issues.

Miller's role at the criminal trial was simply that of a witness for the prosecution. Miller had no opportunity to engage in any discovery, or assert any defense which could shield him from civil liability. For example, respondent Miller could not divulge the name, or all of the information provided to him by the confidential informant, which the prosecutor wanted withheld[5]. Also, respondent Miller could not have appealed the state appellate court's decision on the issue of probable cause and he had no control over the Attorney General's Office decision not to appeal the decision to the California Supreme Court. Thus, to assume that respondent Miller, merely because he was

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5. The confidential informant's name, and all of the information he provided law enforcement, were revealed at the civil trial.

a witness at the earlier criminal proceedings, could litigate therein the probable cause issue is fallacious.

Since at least two of the four basic requirements for the doctrine of collateral estoppel cannot be satisfied, the Court of Appeals properly upheld the District Court's decision not to prevent respondent Miller from relitgating the probable cause issue[6].

B. **Judicial Notice**

Petitioners argue, without resort to concepts of collateral estoppel or res judicata, that the facts stated in the state unpublished appellate court's opinion concerning what transpired prior to the petitioners' arrest should have been judicially noticed, and removed from dispute at trial because for evidentiary purposes they were indisputably true. Petitioners' argument has no merit for several reasons.

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6. Finally, assuming arguendo that petitioners are correct, and that the District Court should have foreclosed respondent Miller from relitigating the issue of probable cause, Miller was still entitled to present at trial evidence in support of his qualified immunity defense. Based upon that evidence, the jury resolved questions of fact, and the District Court found that respondent Miller was entitled to qualified immunity because a reasonable officer could have believed petitioners' arrest to be lawful, in light of clearly established law and the information respondent possessed. Petitioners do not challenge this finding. Thus, even if the District Court erred in not applying collateral estoppel, the verdict in favor of respondent Miller must still be affirmed.

First, Fed. R. Evid. 201(b) provides:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Apparently, the petitioners believe that the findings made by the California Court of Appeals in its unpublished opinion fall into the latter category. A court, however, may take judicial notice of a document filed in another court "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991) (citing United States ex rel. Geisler v. Walters, 510 F.2d 887, 890 n.4 (3d Cir. 1975); Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384 (2nd Cir. 1992) (court may take judicial notice of a document filed in another court, but not for the truth of the matters asserted therein). Here, petitioners wanted the District Court to rely upon the unpublished "Opinion" precisely to establish facts asserted therein, i.e., "Who did what to whom, when and why?" Petition 11.

Second, petitioners' argument overlooks an essential fact, namely that the unpublished opinion could not have been relied on by the District Court because none of the exceptions of Cal. R. of Court 977 applied. That section provides:

> "(a) An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in sub.(b).
>
> (b) (1) when the opinion is relevant under the doctrines of the law of the case, res judicata, or collateral estoppel; or (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

Finally, in Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1563-69, 8 Cal.Rptr.2d 552, the court refused to

take judicial notice of the truth of facts asserted in findings of fact made by another court[7]:

> "While we have no quarrel with the fact that a judge, after hearing a factual dispute between litigants A and B, may choose to believe A, and make a finding of fact in A's favor, and while we have no quarrel that at some subsequent time it may be proper to take judicial notice that the judge did in fact make that particular finding in favor of A, the taking of judicial notice that the judge made a particular factual finding in favor of A is a far cry from the taking of judicial notice that the "facts" found by the judge must necessarily be the true facts, i.e., must necessarily be "the truth."... Indeed, if A's testimony consisted of "facts...that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Evid. Code, § 452, subd. (h)), there

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7. Although Sosinsky is not binding on this Court, its analysis of the issue is well reasoned, and more importantly, consistent with the provisions of Fed. R. Evid. 201(b) concerning judicial notice.

> would have been no need for a trial on the dispute between A and B in the first place.... Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so."

In light of the foregoing, the Court of Appeals properly upheld the District Court's decision not to take judicial notice of the truth of the facts stated in the unpublished California Court of Appeal's opinion.

C. **Conclusion**

This case does not merit further review by this Court. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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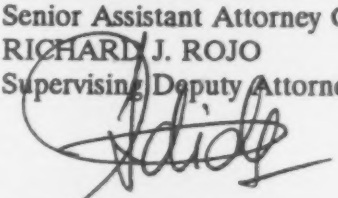

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